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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JIM ALEX STORY,

Defendant and Appellant.

F055916

(Super. Ct. No. VCF183765)

**O P I N I O N**

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Nuttall and Coleman and Roger T. Nuttall for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Vartabedian, Acting P.J., Dawson, J., and Kane, J.

## STATEMENT OF THE CASE

On November 7, 2007, the Tulare County District Attorney filed an information in superior court charging appellant as follows: Count 1--assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] with personal infliction of great bodily injury (§ 12022.7, subd. (a)); Count 2--battery with serious bodily injury (§ 243, subd. (d)); Count 3--misdemeanor cruelty to a child by endangering health (§ 273a, subd. (b)); and Count 4--misdemeanor battery (§ 242).

On or about November 20, 2007, appellant was arraigned, pleaded not guilty to the substantive counts, and denied the special allegations.

On June 23, 2008, the court dismissed count 4 on motion of the district attorney. Jury trial commenced the same day.

On June 25, 2008, the jury returned verdicts finding appellant guilty of count 3.

On July 1, 2008, the court suspended imposition of sentence and placed appellant on summary probation for a period of 48 months, subject to service of 60 days in county jail, with five days of custody credits. The court ordered appellant to pay $130 in fines and fees and to attend a program on child abuse.

On August 13, 2008, the court granted appellant's motion for continued release pending appeal and for stay of execution of judgment pending appeal.

On August 18, 2008, appellant filed a timely notice of appeal.

## STATEMENT OF FACTS

Appellant and his longtime girlfriend, M., were the parents of two children, son C. and daughter T. On May 11, 2007, appellant and M. became upset with one another. Appellant was experiencing a toothache and was unable to drive to an early morning

[1] All further statutory references are to the Penal Code unless otherwise indicated.

appointment with a dentist in Ivanhoe. M. could not drive him to the appointment because she had to drive the children to school. Appellant's appointment was rescheduled to 2 p.m. that day.

M. attended their daughter's Mothers' Day program at the school between one and two in the afternoon. M. and T. then drove appellant to the dental office in Ivanhoe. The two adults argued during the drive and appellant arrived late for his appointment. The dentist saw him at about 2:30 p.m. and the appointment took about two hours. The dentist pulled one of appellant's teeth and prescribed an antibiotic and Vicodin for pain.

Appellant and M. filled the prescriptions at a pharmacy, picked up C. at his paternal grandfather's home, and then traveled home with the children. They arrived home just before 6 p.m. The family originally planned to attend BMX bike races at the Tulare County Fairgrounds. As a result of his dental work, appellant decided to forgo the BMX races. He took a Vicodin pill and planned to relax. A short time later, appellant went outside and told C. the latter would have to complete his chores before C. left for the BMX races that evening.

C.'s chores included picking up trash, branches, and brush in the backyard and cleaning up after the family dog. Appellant eventually went outside and told C. he was not properly completing his chores. C. became mad because he believed he was doing the chores in the right way.[2] C. testified he "didn't like" his father at that moment and may have yelled "a little bit." According to C., appellant replied, "You don't like me now?" Appellant then grabbed C., threw him to the ground, "jumped" on C., and "kneed" him in the side. C. sustained a cut lip and believed it occurred when appellant held his hand over C.'s face while hitting C.'s side with his knee.[3]

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[2] C's mother, M., did not believe C. was doing his chores at all.

[3] C.'s sister, T., went inside the house at this point in time. She told her mother that appellant and C. were fighting. M. looked outside and saw appellant and C. wrestling on

Appellant went inside to talk to M. According to M., appellant said C. was not doing what he was told. Appellant then got mad and kicked and broke a rocking chair. M. felt appellant was letting his temper get out of control and that it was not a proper time to discipline C. C. got up and tried to calm down his parents because they were screaming at each other. Ten minutes later, appellant went back outside and asked C. why he had not yet finished his chores. C. said his leg hurt. Appellant then "came at" C., knocked him to the ground, and "[k]need" C. in the side of the head. C. responded by kicking appellant. C. sustained a cut lip, scratches, and bruising as a result of this encounter.

C. testified he had a good relationship with appellant and that the two would occasionally roughhouse and wrestle each other. C. also acknowledged that he may have "sassed" his father about the completion of his chores. M. said C. had an "attitude" and a "smart mouth" but was not a disciplinary problem.

Tulare County Deputy Sheriff Aaron Buckmaster testified he responded to a call about a disturbance or fight in progress at 7:20 p.m. on May 11, 2007. When Buckmaster arrived at the scene, he spoke with appellant. The latter referred to an apparent altercation with his father-in-law and denied beating up "that drunk." Buckmaster said the older male was covered in blood and numerous injuries around his face. Hospital emergency personnel later found abrasions to the older man's face, a hematoma to the left side of the face, and lacerations around the left lip area and jaw area. The father-in-law testified he had received a telephone call from his daughter, M. M. said she was having a problem with appellant and asked her father to come by. When he arrived, appellant and M. were mad and their children were crying. Appellant ultimately

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the ground. At one point in her testimony, M. said she saw appellant sitting on top of C. At another point she said she looked outside and saw the pair having an argument.

approached his father-in-law and the latter thought he was going to be attacked. The father-in-law, who had consumed five 12-ounce beers earlier that day, used his fist and hit appellant in the face. The father-in-law ultimately fell to the ground, hit his head on some cement, and lost consciousness. An ambulance took him to the Tulare hospital, where he was tested and had his facial wounds stitched. Medical reports indicated he had a 0.13 blood alcohol level at the hospital. The father-in-law eventually went to Stanford Hospital in Palo Alto for further examination.

**Defense**

Appellant testified on his own behalf. Appellant said he had met M. 17 and one-half years earlier and that they had two children together. Appellant said M.'s father was a strong man and had once used a shotgun to blow out the windows of a car driven by his ex-wife. Appellant considered M.'s father violent and was afraid of him, especially when M.'s father was drinking.

As to the incident of May 11, appellant said he was suffering from a toothache and the movement of the jaw and the act of breathing caused him to hurt. The appointment was originally set for the early morning but appellant could not travel to the dentist's office on his own because he was experiencing pain. Appellant said he and M. bickered back and forth but the exchange was "just small stuff." Appellant said he went to the dentist during the 2 p.m. hour and stayed there for a couple of hours for a tooth extraction. His gum bled on the trip home and appellant changed the cotton several times. On the way home, appellant and M. picked up C. and filled appellant's prescription for an antibiotic and for Vicodin. Appellant did not take the medications until he got home. Once he took the medicine, he sat down in a recliner chair for rest. A few minutes after appellant took the Vicodin, C. asked whether they were going to attend the races. Appellant said the others could attend but he was not going because he did not feel up to it. Appellant told C. to ask M. if she would take him. M. became a little upset

because appellant normally took the family to the races. When M. finally agreed to take C., appellant reminded her that C. needed to pick up trash and do other chores. Appellant estimated the chores would take about 15 minutes total.

C. went outside, returned two minutes later, and said he was done with the chores. Appellant went outside and saw that C. had not picked up everything. When appellant pointed out the additional items that C. needed to pick up, C. threw a fit, started to mouth off, and asked why his sister, T., was not helping. Appellant said he was not feeling good and instructed C. to take care of the chores. C. turned around and said he hated appellant and that he did not like appellant any more. Appellant asked, "You really mean that, huh?" C. responded, "[Y]eah, what are you going to do about it?" After a further exchange, appellant said, "You don't want to go there. ... You are getting way out of line." C. pushed appellant and the latter reached for C., who slipped and fell straight down on the ground. Appellant stood over C. and said, "Now what are you going to do?" C. responded by saying, "nothing punk," and kicking appellant. Appellant went inside, spoke with M., and said she needed to straighten out her son. M. said she did not want to be bothered and appellant responded by kicking a chair and going back outside.

When appellant returned outside, appellant was moving slowly and C. again referred to appellant as "punk." Appellant said C. began playing around, acting as though he wanted to fight appellant. Appellant told C. it was not "a playing around matter." Appellant said he reached for C., the latter fell, C. kicked appellant in the knee, and appellant then fell on top of C., straddling him. Appellant said he held onto C. loosely and asked for an apology. C. did not say anything and T. came over and began laughing. C. asked T. to have M. come outside. When M. arrived, appellant told her he was not holding C. tightly and that C. could get out if he wanted to do so. C. crawled out of appellant's hold and M. started yelling at appellant. However, appellant said he did not do anything wrong and further said that M. should have come outside earlier and

helped out. M. and appellant had words with one another and M. began to drive away with T. and C.

Before M. could depart, her father arrived on the scene. M. and appellant argued further and appellant threatened to take all of her possessions, throw them in a pile, and burn them. M.'s father repeatedly said, "Partner, don't do something you are going to regret." Appellant said he had words with M.'s father and the latter eventually hit appellant multiple times in the mouth, nose, and side of the head. Appellant started bleeding profusely and the blows dislodged the cotton inside his mouth. Appellant said M.'s father was drunk, slurring his speech, and stumbling. Appellant finally grabbed M.'s father, they tangled up, and both men hit their heads on the bumper of a nearby vehicle. Appellant ended up on the ground and M.'s father's struck appellant two or three times with a boot. Appellant eventually got on top of M.'s father and held him down. M.'s father grabbed appellant's left leg and appellant made a kicking motion to get away from him. Appellant said he did not try to intentionally kick M.'s father but just tried to get away from him. Appellant then went inside the house to clean up the blood on his clothes and person. Appellant acknowledged that he has a temper when he gets "pushed far enough" and said he felt pushed that day.

Appellant said he told Detective Fernandez, the interviewing officer, he touched his son, C., but did not pick up C. and throw him down. Appellant said C. backpedaled, lost his footing, and fell down on his own. Appellant also said the bruise on C.'s hip was sustained from bicycle racing in the preceding week. Appellant explained, "He looped out, that's why he didn't know where he got it from. And I am sure some of the other ones were from that too." Appellant said C. started crying when M. walked up. Appellant maintained C. was the aggressor. He told Detective Fernandez he did not touch C., take him to the ground, or strike C. with his knee. However, after C. fell to the ground, appellant did wrap his legs around the lower part of C.'s body. Appellant

explained, "He was kicking a little bit and I was kind of squeezing tighter. I didn't knee him though."

**Rebuttal**

Appellant's daughter, T., testified she saw her grandfather's face when he arrived at her home and there were no bruises or injuries prior to the altercation with appellant. T. denied laughing when she saw the encounter between her brother, C., and her father. She said they did not look like they were playing around during the encounter and she went inside to tell M., her mother, that appellant and C. were fighting. T. said she was upset and crying when her grandfather arrived at their home. T. said there was a lot of fighting going on between appellant and C. She acknowledged her brother was somewhat disrespectful to appellant, but she denied laughing at their altercation. She said she was sad at the situation. She also said she and C. both picked up trash in the back yard.

M. testified there were no injuries to her father's face prior to his encounter with appellant. M. also said she had always planned to go to the BMX bike racing that evening and customarily kept score. She said the family went BMX bike racing every Friday and Sunday since 1999. M. said she tried to leave after the incidents between appellant and C. and prior to the arrival of her father. However, she never moved her vehicle. She was certain that appellant kicked her father. M. admitted being upset about driving appellant to the dentist that day because she had other things she needed to do and she felt he could have gone by himself. M. said she could not take appellant to the original appointment at 7 a.m. because she had to take the children to school and T. had a mother-daughter Mother's Day pageant that day. M. explained she went to T.'s school for the pageant, picked appellant up, and took him to the dentist in Ivanhoe later. M. said she and appellant never talked about him going to the bike races that evening.

C. examined photographs of himself taken at the time of the incidents (People's Exh. Nos. 8, 9, 10, 12, 13) and testified the injuries depicted did not occur as a result of BMX racing. C. said he and appellant engaged in two separate incidents on the day in question. C. denied pushing appellant or falling to the ground on his own in either incident. C. said appellant threw him down in both incidents and C. admitted kicking appellant in the second incident. C. explained he was on his back and kicked appellant in an attempt to get away from him. C. denied horsing around with appellant during the incidents. He said the situation with appellant was serious.

## DISCUSSION

### I. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH THAT APPELLANT CAUSED C. TO SUFFER UNJUSTIFIABLE PUNISHMENT?

Appellant contends the evidence is insufficient to prove that his actions in response to C.'s behavior constituted unjustifiable punishment, as required by section 273a, subdivision (b).

Count 3 of the first amended information alleged:

> "On or about May 11, 2007, in the County of Tulare, the crime of CRUELTY TO A CHILD BY ENDANGERING HEALTH, in violation of PENAL CODE SECTION 273A(B), a MISDEMEANOR, was committed by JIM ALEX STORY, who was a person having the care and custody of C.S., a child of 16 years, who did, under circumstances and conditions other than those likely to produce great bodily injury and death, did willfully cause and permit the person and health of said child to be injured, and did willfully cause and permit said child to be placed in such situation that his/her person and health was/were endangered."

Section 273a, subdivision (b) states:

> "Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits

> that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor."

Section 273a encompasses a wide variety of situations and includes direct and indirect conduct. When the harm to a child is directly inflicted, the mental state for the section 273a offense is general criminal intent. When the harm is indirectly inflicted, the mental state is criminal negligence. The distinction between felony and misdemeanor child endangerment depends on whether the acts or omissions involved circumstances or conditions likely to produce great bodily injury or death to the child. If they did entail such circumstances or conditions, then the offense is a felony (§ 273a, subd. (a)). If they did not entail such circumstances or conditions, then the offense is a misdemeanor (§ 273a, subd. (b)), as charged here. (*People v. Burton* (2006) 143 Cal.App.4th 447, 454, fn. 4.)

"'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Bolden* (2002) 29 Cal.4th 515, 553.) We must draw all reasonable inferences in support of the judgment. (*People v. Wader* (1993) 5 Cal.4th 610, 640.) It is not our function to reweigh the evidence, reappraise the credibility of witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact. We look for substantial evidence, and we may not reverse a conviction for insufficiency of the evidence unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Furthermore, """"[c]ircumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt."""" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury's findings,

our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*Ibid*; *People v. Panah* (2005) 35 Cal.4th 395, 488.)

Appellant submits his punishment of C. on May 11, 2007, was warranted, was not excessive, and therefore the judgment of conviction on count 3 should be reversed. Appellant maintains C. was disrespectful on May 11, appellant had just endured two hours of dental work that day, C. physically pushed appellant and called his father a "punk," and C. further took a swing at appellant and fell to the ground. Appellant acknowledged touching his son, straddling his son's body, and seeking an apology. Appellant said C. attempted to kick him while refusing to apologize. Appellant denied causing any bruises to C.'s face and maintained they took place at the previous week's BMX bike race. Appellant notes that photographs of his hands taken after the incidents failed to show any abrasions, bruising, cuts, or scarring.

Generally speaking, a parent has a right to reasonably discipline a child and may administer reasonable punishment without incurring liability for a battery. This includes the right to inflict reasonable corporal punishment. A parent who willfully inflicts unjustifiable punishment is not immune from either civil liability or criminal prosecution. Corporal punishment is unjustified when it is not warranted by the circumstances. For example, such punishment is unjustifiable when it is unnecessary or is warranted by the circumstances but is excessive. The reasonableness of punishment and the necessity for punishment are to be determined by a jury under the circumstances of each case. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1050.) Reasonable acts of discipline--including the confinement of a child to a particular location for disciplinary purposes such as sending a child to his or her room--constitute lawful exercise of parental authority. Parents who are prosecuted for battery of their children may assert parental authority as a defense. (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1194.)

Appellant devotes a substantial portion of his opening brief to a summary of evidence favorable to his position. He concludes: "[A]ppellant's discipline of [C.] was justified in light of [C.'s] disrespectful verbal comments - particularly where [C.] elected to misbehave when he knew that his father was in significant pain - and where [C.] pushed his father." The rules of appellate review require us to evaluate the evidence in the light most favorable to the respondent and presume in support of the judgment every fact a jury could have reasonably deduced from the evidence. (*People v. Millwee* (1998) 18 Cal.4th 96, 132; *People v. Stanley* (1995) 10 Cal.4th 764, 792-793.) We may not weigh the evidence or make findings of credibility, for these are within the province of the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We must only decide whether substantial evidence exists to support the inference of guilt drawn by the trier of fact. Substantial evidence includes circumstantial evidence and the reasonable inferences this evidence allows. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusions. (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1161-1162.) The direct evidence of a single witness entitled to full credit is sufficient for proof of any fact. (Evid. Code, § 411.)

During the prosecution's case-in-chief, C. testified appellant grabbed him, pushed him back, and threw him on the ground. Once appellant took C. to the ground, appellant jumped on C., stayed on top of him for a brief time, and kneed C. in the ribs. C. reviewed various photographs of his face and body in the presence of the jury (People's Exh. Nos. 8-10, 12, 13). He identified scratches and a bruise in the hip and side area and attributed them to "[o]ne of the times he threw me down I think." He identified scratches on his back that occurred after appellant threw him down. He identified a cut to his lip as one that occurred when appellant "grabbed me on my face." C. also saw appellant apparently knock out his grandfather. From C.'s version of events, the jury could reasonably

conclude appellant willfully inflicted unjustifiable physical pain on C. during their altercation or willfully caused C. to experience mental suffering by beating his maternal grandfather unconscious in C.'s presence. Although appellant insists his version of events is correct, a reviewing court will not substitute its credibility evaluation of a witness for that of the trier of fact. (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206.)

The judgment of conviction was supported by substantial evidence and reversal is not required.

## II. DID THE PROSECUTOR ENGAGE IN PREJUDICIAL MISCONDUCT?

Appellant contends the prosecutor engaged in prejudicial misconduct by (1) appealing to the passions and prejudice of the jury during the presentation of C.'s testimony; (2) making improper comments during closing argument; and (3) vouching for the credibility of prosecution witnesses during closing argument.

Appellant raises numerous instances of alleged prosecutorial misconduct and asserts that these instances taken individually or collectively compel reversal of his conviction. We disagree.

The law governing prosecutorial misconduct is well established. Conduct by a prosecutor that does not violate a court ruling is misconduct only if it amounts to "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury'" or "'is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Silva* (2001) 25 Cal.4th 345, 373; accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 120.) A finding of misconduct does not require a determination that the prosecutor acted in bad faith or with wrongful intent. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) To preserve a claim of prosecutorial misconduct for appeal, a defendant must object and seek an admonition if an objection and admonition would have cured the harm. (*Ibid; People v. Hill* (1998) 17 Cal.4th 800,

820.) "A defendant's conviction will not be reversed for prosecutorial misconduct ... unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew, supra,* 31 Cal.4th at p. 839.)

During the direct examination of C. in the case-in-chief, the prosecutor asked whether it was difficult for C. to testify about his father. In phrasing a question, the prosecutor also implied that it might be difficult to so testify. On cross-examination during the defense case, appellant said C. lost his footing while trying to approach appellant and the prosecutor responded by saying, "I'll write that down." During closing argument, the prosecutor stated, "[I]t's hard to question the credibility of [C.]." Later in the argument, the prosecutor reviewed the various versions of events and observed, "Now either [C.] is lying or that's what happened. It was cut and dry." Still later in the argument, the prosecutor pointed out inconsistencies in the trial testimony and noted, "[C.] didn't do anything to deserve what happened." Even later in the argument, the prosecutor stated: "[Y]ou will be able to gauge the testimony of [C.] of whether he was believable or not. There is nothing that was presented out to say that he was lying." After playing a tape recording of a law enforcement interview with appellant, the prosecutor observed, "He denies anything with [C.]. I'll go with what [C.] says." Appellant claims these various statements constitute prejudicial misconduct. Appellant has forfeited each claim of prosecutorial misconduct because of his failure to object at trial. (*People v. Silva, supra,* 25 Cal.4th at p. 373; see *People v. Miller* (1990) 50 Cal.3d 954, 1000-1001.) Appellant claims "[n]o measure of curative instructions by the court following objections could have cured these wrongs." A claim of prosecutorial misconduct is not preserved for appeal if a defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. (*People v. Scott* (1997) 15 Cal.4th 1188, 1217.) The challenged portions of testimony and argument fall far short of the requisite "deceptive and reprehensible methods" and an admonition

would have cured any harm. Appellant failed to preserve his claim of prosecutorial misconduct for appeal and no further discussion is required.

## DISPOSITION

The judgment is affirmed.